LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JUL 11 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term—~~1948~~ 1949

No. 150

ALBERT G. DICKINSON,
Petitioner,

against

PETROLEUM CONVERSION CORPORATION.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALEXANDER KAHAN,
Attorney for Petroleum Conversion Corporation, Bankrupt,
60 Broad Street,
New York, N. Y.

On the brief:
HARRY J. PASTERNAK,
Of Counsel.

APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033

INDEX

	PAGE
SUMMARY STATEMENT OF THE MATTERS INVOLVED	2
SUMMARY OF ARGUMENT	4
POINT I—Petroleum Conversion Corporation could appeal only from the final decree of August 3, 1948 and not from the decree of April 10, 1947 because the latter decree was not final. An appeal from the decree of August 3, 1948 automatically included an appeal from the earlier decree of April 10, 1947 as well	4
POINT II	10
POINT III	11
CONCLUSION	12

Table of Cases Cited

Allen B. Wrisley Distributing Co. *v.* Serewicz, C.C.A. Seventh Circuit 1946 (158 Fed. (2d) 721)	5
Catlin *v.* United States of America, 324 U. S. 229, at pages 233, 234	8
Clark *v.* Taylor, C.C.A. 2nd Circuit 1947 (163 Fed. (2d) 940)	5, 8, 10
Collins *v.* Miller, 252 U. S. 364	10
Craighead *v.* Wilson, 18 Howard 199	5
Dickinson *v.* Rinke, et al., 173 Fed. 2nd 738	10
Hill *v.* Hawes, 320 U. S. 520	5, 9
Kuhn *v.* Canteen Food Service, C.C.A. Seventh Circuit 1945 (150 Fed. 2d 55)	5

PAGE

Leishman *v.* Associated Wholesale Electric Co., 318 U. S. 203 5

Suggs *v.* Mutual Ben. Health and Accident Association, C.C.A. 10th Circuit 1940 (115 Fed. (2d) 80) 5

Toyosaburo Korematsu *v.* United States, 319 U. S. 432 5

United States *v.* Braunstein (C.C.A. 2nd Circuit 1948) 8

Zimmern *v.* United States, 298 U. S. 167, 80 L. ed. 1121 ..... 5, 6, 7

Statutes Cited

Federal Rules of Civil Procedure, Rule 77 (d) 2, 9

New United States Code of Judiciary & Judicial Procedure, Sections 1291-1292 ..... 4, 5

IN THE

Supreme Court of the United States

October Term—1948

No.

ALBERT G. DICKINSON,

Petitioner,

against

PETROLEUM CONVERSION CORPORATION.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petroleum Conversion Corporation by its Trustee in Bankruptcy, respectfully prays that a writ of certiorari be not issued to review an order of the United States Court of Appeals for the Second Circuit, entered March 31, 1949, denying petitioner's motion to dismiss the Trustee's appeal, on behalf of said Petroleum Conversion Corporation, Bankrupt, from a judgment of the District Court, for the Southern District of New York entered August 3, 1948, in the action entitled "Albert G. Dickinson, plaintiff, against Arthur W. Rinke, et al., defendants, Petroleum Conversion Corporation, E. Lewis Burnham and James A. Vaughan, et al., interveners."

Summary Statement of the Matters Involved

Two decrees were entered by the District Court, one decree dated April 10, 1947 and the other, the final decree, dated August 3, 1948. Petroleum Conversion Corporation served a Notice of Appeal from the final decree and judgment of August 3, 1948, which final decree was made the judgment in said action in accordance with Rules of Civil Procedure 77 (d) and bore the following endorsement at the end thereof,

> "Judgment Rendered William V. Connell Clerk August 3rd, 1948."

and it also had attached to it the following endorsement:

"Office of the Clerk
District Court of the United States
Southern District of New York
United States Courthouse New York, N. Y.

New York City August 3, 1948
Dickinson
Rinke

Docket No. Eq. 86-366

Pursuant to Federal Rule of Civil Procedure No. 77 (d) notice is hereby given of the entry on Aug. 3, 1948 of a judgment in the above proceeding.

WILLIAM V. CONNELL,
Clerk"

The final decree of August 3, 1948 in addition to being called "final decree" also contained the following provision:

> "3. That the issues reserved in the decree herein dated the 10th day of April, 1947, having been de-

> termined by the Court in its decision and opinion and its Findings of Fact and Conclusions of Law filed herein dated the 24th day of July, 1948, the said decree is hereby made final."

The Findings of Fact and Conclusions of Law submitted and approved by all counsel and signed by the Trial Court (District Court) in support of the final decree of August 3, 1948, refers in the first paragraph thereof to the decree of April 10, 1947 as an interlocutory decree. Numerous opinions and decisions filed by the Trial Court in the instant case referred to the decree of April 10, 1947 as interlocutory.

In a memorandum decision rendered by the Trial Court on March 16, 1948, which decision was not appealed from and is therefore the law of the case on this point, in denying a motion for intervention by preferred stockholders of Petroleum Conversion Corporation, referred to the decree of April 10, 1947 in the following language and stated that it was an interlocutory decree and not appealable,

> "Petitioners charge that no appeal was taken by Petroleum Conversion Corporation from the interlocutory decree of April 10, 1947. In my opinion it was not a final decree and was not appealable, at least in so far as it involved the claim for $176,000."

SUMMARY OF ARGUMENT

POINT I

Petroleum Conversion Corporation could appeal only from the final decree of August 3, 1948 and not from the decree of April 10, 1947 because the latter decree was not final. An appeal from the decree of August 3, 1948 automatically included an appeal from the earlier decree of April 10, 1947 as well.

The provisions of the Federal Code of Civil Procedure, as well as the decisions in the numerous cases of the Supreme Court of the United States and the Circuit Courts, clearly bar an appeal from an order such as the decree of April 10, 1947.

Section 1291 of the new United States Code of Judiciary and Judicial Procedure states that the jurisdiction of the Court of Appeals is "from all final decrees of the District Courts of the United States. * * *"

Section 1292 of the new United States Code of Judiciary and Judicial Procedure defines the jurisdiction of the Court of Appeals in the case of interlocutory decisions and limits it to four categories, none of which are applicable to the case at bar. For the sake of brevity we shall not enumerate these four categories, since they are not applicable to the decree of April 10, 1947, constantly referred to by the Trial Court as "Interlocutory decree."

It might be stated parenthetically that these two sections of the new United States Code of Judiciary and Judicial Procedure substantially incorporate into statute law what case law had previously held to be the law of the United States Courts.

We will not attempt to overwhelm this Court with citations as did our adversaries in their brief, but would like

to call the Court's attention to several of the leading United States Supreme Court and Circuit Court of Appeals cases such as *Zimmern* v. *United States*, 298 U. S. 167; 80 L. ed. 1121; *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203; *Toyosaburo Korematsu* v. *United States*, 319 U. S. 432; *Hill* v. *Hawes*, 320 U. S. 520; *Clark* v. *Taylor*, C.C.A. Second Circuit 1947 (163 Fed. (2d) 940); *Suggs* v. *Mutual Ben. Health and Accident Association*, C.C.A. Tenth Circuit 1940 (115 Fed. (2d) 80); *Kuhn* v. *Canteen Food Service*, C.C.A. Seventh Circuit 1945 (150 Fed. (2d) 55); *Allen B. Wrisley Distributing Co.* v. *Serewicz*, C.C.A. Seventh Circuit 1946 (158 Fed. (2d) 721).

The United States Supreme Court, in the early case of *Craighead* v. *Wilson*, 18 Howard 199 enunciated a rule, which is still the rule of the United States Courts, as expressed in the aforementioned provisions of Sections 1291 and 1292 of the new United States Code of Judiciary and Judicial Procedure. The following succinct language, used by Mr. Justice McLean in that case in 1856, is coincidentally and peculiarly applicable to the case at bar:

> "The above cases are sufficient to show the grounds on which appeals in chancery are dismissed. To authorize an appeal, the decree must be final in all matters within the pleadings, so that an affirmance of the decree will end the suit. To apply this test, in all cases, cannot be difficult.
>
> In no legal sense of the term is the decree now before us a final one. The basis of the decree, embracing the equities in the bill, is found, but the distribution among the parties in interest depends upon the facts to be reported by the master. It is his duty, under the interlocutory decree to balance the equities, by ascertaining what has been expended on the property, and what has been received by each of the claimants; and also every other matter which should have a bearing and influence

> in the distribution of the property. Until the court shall have acted upon this report and sanctioned it, giving to each of the devisees his share of the estate under the will, the decree is not final."

The Trial Court decided and incorporated in the decree of April 10, 1947 the basis of the equities, namely, that the petitioner was guilty of many kinds of fraud and deceit against the corporation and also found that the Rinke Agency, one of the intervenors-appellees, in a representative capacity, was entitled to a recovery against the plaintiff-appellant (petitioner), for the wrongs to the corporation; but the Trial Court explicitly left and reserved for subsequent determination after hearings before the Court the question of the full amount of the judgment, the names of the numerous individuals represented by the Rinke Agency to whom the judgment should be paid and the amounts to be paid to each of these individuals as well as other important matters. This part of the case required the taking of further testimony of upwards of eight hundred pages and the introduction of many additional exhibits. Even the subscription agreements themselves of the individuals whom the Rinke Agency represented were not legally determined insofar as the rights of these individuals were concerned and the dollar amount and extent of their participating interests, until after the hearings following the decree of April 10, 1947.

The Trial Court in its decree of April 10, 1947, also provided for the subsequent entry of judgment, taxation of costs and many other steps necessary before this decree would in effect become a final decree, an appeal from which would completely terminate the case as would meet the requirements of the rules of this Court.

Mr. Justice Cardozo in the case of *Zimmern* v. *United States of America*, *supra*, at page 169, points out a num-

ber of acts which the District Court in that case reserved for a subsequent decree and which thereby made the first decree not appealable because of lack of finality.

> "We think the decision misapprehends the effect of the order of May 11, 1934, in which the judge who had tried the cause declared himself dissatisfied with the decree that he had made, and to give himself an opportunity to make the necessary changes extended the term then drawing to a close. He did not limit the amendment to matters of form only as distinguished from those of substance. He did not act so far as the record shows, at the instance of the defendants, still less upon a showing of error in only one particular. He stated broadly and, for all that appears, of his own motion that changes must be made, and without a word to indicate whether he meant them to be great or little. We think the effect of that order was to suspend the operation of the decree so that no appeal could be taken from it until it had been amended or confirmed, and its vigor thus restored. Until such action had been taken it was no longer a decree at all. The judge had plenary power while the term was in existence to modify his judgment for error of fact or law or even revoke it altogether. Doss *v.* Tyack, 14 How. 297, 313, 14 L. ed. 428, 435; Basset *v.* United States, 9 Wall. 38, 41, 19 L. ed. 548, 549; Bronson *v.* Schulton, 104 U. S. 410, 415, 26 L. ed. 797, 799; Henderson *v.* Carbondale Coal & Coke Co., 140 U. S. 25, 40, 35 L. ed. 332, 338, 11 S. Ct. 691. Finality was lacking until his choice had been announced."

At the end of the report of this case in 80 L. ed. at page 1121 there appears a compilation of cases in the United States Courts as well as in many of the States Courts, supporting the rule.

The further acts which the Trial Court left for future determination to be adjudicated and included in the final

decree most certainly amount to "amendments, modifications or further acts," as set forth in the herein quoted decisions and cited cases and which prevent an appeal from the Trial Court's earlier decree of April 10, 1947, under the doctrine of finality.

Mr. Justice Rutledge in a later case, *Catlin* v. *United States of America*, 324 U. S. 229, at pages 233 and 234 strongly reiterated the doctrine of finality in the following language:

> "Their right to appeal rests upon §128 of the Judicial Code. This limits review to 'final decisions' in the District Court. A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. St. Louis, I. M. & S. R. Co. *v.* Southern Exp. Co., 108 U. S. 24, 28, 27 L. ed. 638, 639, 2 S. Ct. 6. * * *
>
> * * * The foundation of this policy is not in merely technical conceptions of 'finality'. It is one against piecemeal litigation. 'The case is not to be sent up in fragments. * * *' Luxton *v.* North River Bridge Co., 147 U. S. 337, 341, 37 L. ed. 194, 195, 13 S. Ct. 356. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals."

Mr. Justice Augustus N. Hand in a very succinct opinion of June 22, 1948 also affirmed this rule in *United States* v. *Braunstein* (C.C.A. 2nd Circuit 1948), 168 F. 2nd 749. So too does Mr. Justice Clark in the case of *Clark* v. *Taylor, supra,* at page 942 in the following language:

> "Upon this record it seems to us clear that this is the case of suit by the appropriate government official against two rival claimants to the same fund or chose in action, and that there will be a final judgment only when there is a decision as to the

existence and ownership of the property in dispute."

In the case at bar, one of the elements which was still lacking in order to make the decree of April 10, 1947 final was the determination of the existence and ownership of the claims of the various subscribers of the Rinke Agency. The interest of the interveners-appellees, Rinke Agency, and the Petroleum Conversion Corporation itself, were conflicting. The latter had no way of taking an appeal from an interlocutory decree which had not even been reduced to judgment. The judgment was not and could not be entered until a final decree was made herein, because the names of the persons in whose favor the judgments were to be entered and the amounts of their respective judgments were not to be determined until after the April 10, 1947 decree and in fact were not determined until the August 3, 1948 decree.

We have already pointed out that the technical requirements as to entry and notice of judgment pursuant to Section 77 (d) of the Federal Rules of Civil Procedure were complied with only in connection with the decree of August 3, 1948 which was the final decree and the only decree from which Petroleum Conversion Corporation could appeal. The Trial Court and all the parties thereto also called this the final decree. The Supreme Court of the United States has held that this technical requirement is important in determining the finality of the decree in the case of *Hill* v. *Hawes, supra,* at page 523, in the following language:

"It is true that Rule 77 (d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect

> to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule."

Without in any way attempting to distinguish the numerous cases cited in our adversaries' brief, we cannot possibly see how any of these cases can change the basic law as it is enunciated above both by statute and case law and by the Trial Court itself in its decision, quoted from on page 3, *supra*.

We cannot fathom the attempted explaining away by our adversaries of the case of *Collins* v. *Miller*, 252 U. S. 364. We respectfully quote the following language from that case at page 370:

> "Second: A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete. * * * (Many cases cited.) And the rule requires that the judgment, to be appealable, should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved. * * * (Cases cited.)"

POINT II

The United States Court of Appeals for the Second Circuit in its opinion filed on March 31, 1949, 173 Fed. 2nd 738, in the instant case, regarded the entire litigation as a whole as the controversy, not the series of mutual rights and liabilities which had arisen out of it.

The Court under this point in relying upon *Clark* v. *Taylor*, *supra*, to support its holding in the instant case stated in part as follows:

> "* * * On the other hand, we cannot find any tenable distinction between the situation at bar and

that which was before the court in Clark *v.* Taylor, where we dismissed the appeal. It is true that the interlocutory judgment in that case had not decided anything as between the plaintiff and Taylor, the president of the A.S.C.A.P.; in which regard it was different from the judgment of April tenth, 1947, which did decide that Dickinson and Lloyd were liable to the 'Rinke Agency Subscribers,' and what was the limit of that liability. But we do not understand that the majority in Clark *v.* Taylor, supra, went upon any such distinction; on the contrary they regarded the 'transaction,' the 'occurrence' as a whole, as the controversy, not the series of mutual rights and liabilities which had arisen out of it; and they held that until all these had been determined, no appeal lay, however, finally any part of those rights and liabilities might be disposed of. It was only in case 'transactions' or 'occurrences' wholly disconnected were coupled, as the Rules permitted, that separate appeals could be taken. That case was decided only after the greatest deliberation, and the opinions then rendered contain all that can be said in support of either view. It appears to all three of us in the present court most undesirable to repudiate a precedent so established. * * *"

POINT III

The United States Court of Appeals for the Second Circuit in its opinion in the instant case was correct when it held that the judgment of April 10, 1947 was not final as to Petroleum Conversion Corporation and was therefor not appealable and that by its failure then to appeal it lost no rights of review or conversely Petroleum Conversion Corporation properly appealed from the only final judgment in the case dated August 3, 1948.

The transcript of record submitted by the petitioner has omitted in Exhibit D at pages 30 through 37, the

endorsement appearing on the final decree and judgment dated August 3, 1948. Whether this omission was deliberate or an oversight matters little, but it is an extremely important omission and consequently the within brief at page 2 contains a detailed statement of said endorsement.

CONCLUSION

A writ of certiorari should be denied.

Dated, New York, July 12th, 1949.

Respectfully submitted,

ALEXANDER KAHAN,
Attorney for Petroleum Conversion Corporation, Bankrupt,
60 Broad Street,
New York, N. Y.

On the brief:
HARRY J. PASTERNAK,
Of Counsel.